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IN THE

Supreme Court of the United States

October Term—1953

346 U.S.
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14

No. 251

WILLIAM BRUNE,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of Matter

Your petitioner, William Brune, respectfully shows that:

The Municipal Court of the Borough of Verona, New Jersey, on May 19, 1952, convicted the petitioner of operating an automobile while under the influence of intoxicating liquor and imposed a sentence of 3 months imprisonment in the Essex County Jail; payment of costs of $25.00; and, revocation of his driver's license (R. 4, 7a).

He appealed to the Essex County Court, where after a trial de novo the conviction and sentence were sustained on September 22nd, 1952 (R. 70a).

The trial judge of the Essex County Court granted a certificate of reasonable doubt of legality of the conviction and admitted the defendant to bail (R. 2, 7a). Thereupon, the petitioner appealed to the Appellate Division of the Superior Court of New Jersey, which sustained the conviction by written opinion (R. 1a to 6a), on March 18, 1953.

Petitioner then filed a Petition for Certification in the Supreme Court of New Jersey to be directed to the Appellate Division of the Superior Court of New Jersey, which denied it on June 8th, 1953.

Legal Nature and Substance of Case

The trial judge of the Essex County Court of New Jersey, at the trial de novo, mistakenly and glaringly violated the substantial constitutional rights of the petitioner; and, it appears on the face of the record that the conviction was in violation of the defendant's right to the preservation of his liberty by due process of law guaranteed by the 14th Amendment to the United States Constitution. The trial Court ignored the defendant's presumption of innocence and virtually imposed upon him the unconstitutional obligation of producing certain witnesses to establish his innocence. The failure of the defendant to do this caused him to be discredited in the eyes of the Court, in flagrant violation of defendant's statutory, federal and state constitutional rights. Especially, since the witnesses whose absence the court charged against the defendant were just as available to the State as to the accused. That these witnesses, whose absence the Court took as an indicia of defendant's guilt, were not in privileged communication with

the defendant or in his control; and, the testimony of the absent witneses would be inferior and cumulative of the evidence already adduced by the defendant.

The arresting officer and the desk sergeant were roundly and convincingly discredited by the defendant and his witness. Also, the arresting officer was seriously contradicted by the examining doctor, regarding defendant's alcoholic breath, his swaying and orientation. Yet, without basis in law or in fact, the trial Court held that their testimony was uncontradicted. The examining doctor submitted a report and testified relating to tests he made of the defendant showing unmistakable orientation and coordination, indicating his fitness to drive; which negatives the doctor's arbitrary and unsupported conclusion that he was unfit to drive, an error fallen into by the doctor because of his untimely awareness that the defendant has an admitted impediment of speech and is hard of hearing.

The constitutional grounds recited were urged formidably in the intermediate appellate court and the highest court of the State, in which a decision can be had, as I shall marshal hereinafter by verbatim excerpts, giving page references in compliance with Rules 38, par. 2 and 12, par. 1.

The foregoing grounds stand in greater convincing weight of substantial harm to constitutional rights of the defendant and in support of the serious and important jurisdictional reasons in sound discertion to grant the extraordinary Writ of Certiorari. It also stands admitted that there was no speeding, traffic violation, accident, injury or damage involved; that defendant was polite; did everything that he was asked to do; that his clothes and hair were orderly, as were his appearance and behavior; that he did and said nothing unusual; that the pupils of his eyes were not dilated or bloodshot; that he walked a

straight line; did not fall, swagger or stagger; touched his nose with either hand, with his eyes open and closed; went through all these tests from fair to sure; and, signed his name to the medical report without hestitation (R. 13a; 11a; 4a; 21a to 27a).

It would seem incredible that all the three judges of the Appellate Division of the Superior Court of New Jersey, participated in the appellate argument with comments persuasively in favor of the accused and then decide diametrically contrary to their publicly stated opinions on matters germane to the issues, as I shall particularize and identify with page references (R. 2, 3).

Did this take place because the petitioner was previously convicted twice before, which he volunteered on the record? Must manifest prejudice and passion in the instant conviction and sentence make him suffer double and triple penalty, which he already expiated and conceded to society?

Statement of Jurisdiction

Concurrently with the presentation of this petition for allowance of the Writ of Certiorari, vested in the sound judicial discretion of the Justices of this Honorable Supreme Court of the United States, the petitioner hereby presents the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, involving denial of substantial rights. *McArthur* v. *U. S.*, 315 U. S. 787, 62 S. Ct. 915, 86 L. Ed. 1192; *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

I.

Federal Statute.

The petitioner relies upon the Judicial Code, Section 1257, subparagraph 3, Title 28 U.S.C.A., effective September 1, 1948, amending Section 237(b), Act of February 13, 1925, Chapter 229, 43 Statute 936, effective May 13, 1925:

> "An Act to Amend the Judicial Code, and to Further Define the Jurisdiction * * * of the Supreme Court, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that sections * * * 237 * * * of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

"Sec. 237(b) It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree by the highest court of a State in which decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * *"

II.

Constitution of the United States.

Amendment, Article 14, as follows: "* * * ; Nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

III.

Date of Judgment and Application for Review.

June 8, 1953, was the date of the denial of the petition for certification by the Supreme Court of New Jersey, the highest court of the State, for issuance to the Appellate Division of the Superior Court sought for review of its judgment.

It is the standard practice of the Chief Justice of the said highest court to deny application under Rules 36 and 38 of this Court and under Section 8(d) of the Act of February 13, 1925, Chapter 229, 43 Statute 936, for a reasonable stay pending the filing and decision on the petition for certiorari. Therefore, application for a reasonable stay under Rule 38, Section 6, has been made to this Court by separate petition.

IV.

Stages in Proceedings and in What Manner Questions Sought to be Reviewed Were Raised.

(A) Trial Judge's Comment Discrediting Defendant Because of Missing Witness (R 67a, bottom to R 68a, top):

> "* * * Where is the person from the Norwood Inn? If he were buying a car * * * from someone who had something to do with the Norwood Inn, it seems very improbable to me that though they might have been crowded that night he could not get a table. Why wouldn't that person have been inclined to do a small favor for the defendant to get him to buy the automobile, and as a result of that get a table for him? The story that the defendant tells in my mind is very, very improbable."

This was met in the briefs to the Supreme Court of New Jersey, the highest court of the State and in the intermediate appellate division, as follows: (Statement of Questions Involved, R 1).

> "A conviction * * * resulting from palpable error injuriously affecting substantial rights, cannot be sustained:
>
> 1. Where the Court predicates its judgment of guilt mistakenly and glaringly:
>
> (a) Upon the testimony or absence of testimony entirely unrelated to the issue of sobriety
>
> * * *
>
> (d) Where the evidence failed to establish defendant's guilt beyond a reasonable doubt.

ARGUMENT

(R 8 bottom, R 9)

> "The Court here indulges in harmful, wide speculation * * * not pertinent * * * with the specific issue of sobriety. The presumption * * * he could get a table is a conclusion that does not fairly and reasonably follow the fact presumed, neither in the remote possibility of volition or performance. Besides, it ignores the persuasive fact that there was only standing room; that people were 3 deep at the bar; that all tables in the restaurant were taken. (R 32a; R 42a; R 59a; R 60a)
>
> "Under the circumstances, the Court cannot indulge in the presumption that the failure to produce these witnesses negatives the proof that the defendant and his company were there or that there was a crowded condition or a car deal. Were this so, it

would have the effect of the unconstitutional imposition by the Court upon the defendant to supply affirmative proof of defense of innocence and do serious violence to our constitutional rights of due process."

The only facts alluded to are those inextricably interwoven with the federal constitutional question of due process presented. The argument continues that the witnesses were just as available to the State, as to the defendant; that no privileged communication existed between the witnesses and the defendant, that would bar the State from calling them; and, finally that the testimony of the missing witnesses would be cumulative and inferior to that testimony already adduced by the defendant and his witness on the point. The foregoing argument was based upon the case of *O'Neil* v. *Bilotta* (App. Div., February 21, 1952, opinion by McGeehan, Senior Judge, cited R 10). See *Davis* v. *Wechsler,* 263 U. S. 22, 24.

(B) The Examining Doctor's Medical Report and Testimony Negative His Unsupported Conclusion That Defendant Was Unfit to Drive:

On cross-examination, the Doctor testified:

"Q. Are you familiar with the test the National Safety Council devised, the one that is now enacted into law in New Jersey? A. I know the test; I have never done it myself.

Q. Would you think from what you observed of this man that he had in his blood .05 per cent of alcohol? A. It would be very difficult for me to say without actually doing a test. (R 17; R 20a)

Q. A man who has been deprived of his power of muscular coordination to the point where he is

unfit to drive is one who is not able to steer his car and take care of the management of his car in traffic. Isn't that right? A. Yes, sir.

Q. That same thing ought to show up when you ask him to close his eyes, hold his hands out, and touch the tip of his nose? A. Well, as I said, there are some findings that he did not do.

Q. * * * with reference to this one of them on your report here that test was sure, he did it? A. That particular test, yes. (R 21a)

Q. When you threw the coins on the floor for him to pick up * * * (remember his saying) he would do it for you without his glasses? A. I don't remember his saying that.

* * *

Q. All that you have with respect to picking up the coins is that he was slow? A. Yes.

Q. He did pick them up? A. That is right. (R 22a)

Q. You say here as to orientation his awareness of time and place were fair. A. Yes. (R 22a)

Q. You say he had a moderate odor of liquor on his breath? A. Yes, sir. (R 23a)

Q. He did not hesitate when you asked him to sign his name? A. No. (R 24a)

Q. He was polite? A. Yes, he was.

Q. His eyes were normal? A. The pupils were not dilated. (R 21a)

Q. He did not stagger? A. No. (R 23a)

Q. You did not find that he was swaggering? A. No.

Q. Boastful? A. No.

Q. He was not talking loud? A. No.

Q. His pupils were not dilated; his face was not flushed? A. No. (R 24a)

ARGUMENT

(R 16)

"The numerous, substantial contradictions shown (referring to the testimony of officers and Doctor regarding unfitness to drive) is more than just an element of adversary or disparity of testimony. It goes to the required sufficiency of proof to establish guilt in law and in fact, which the State in this case failed to do. The proof in the entire case is abundant and overwhelming that the defendant was fit to drive his automobile."

* * *

"The defendant further claims that the confusion spoken of by the doctor and the officer in reaching the conclusion that the defendant was unfit to drive was brought about by the unawareness that the defendant had an impediment of speech and hearing, accounting for the impression of defendant's reactions at the time of arrest (R 12a). Regarding the doctor, upon inquiry, the defendant said that he came from Butler; the doctor understood Budd Lake and put it on the report (R 5). The doctor admitted that he was not familiar with the routes himself, which added to the confusion.

* * *

"The officer, as seen, was confused about defendant's driving just before the officer stopped him. The officer was uncertain; didn't know; had to see and couldn't make a conclusion. * * * The doctor was confused—concerning the date; because on the report at the bottom, location of date, it appears that the 13th was written over and corrected some other date." (R 69a, Exh. S-1)

(C) The Highest State Court Has Inherent Power and Under Rule 1:2-19 and Rule 1:2-20a, also Given to the Appellate Division Under Rule 4:2-6, in Criminal Cases to Review Errors Apparent on the Face of the Record, May Exercise Original Jurisdiction to Make New and Amended Independent Findings, Where Defendant Suffered Substantial Manifest Wrong and Injury (R 2, 8, and 20).

1. The argument covered the full extent of the Rules and decisions, copiously presented in the briefs to the highest and intermediate State courts. That when manifest wrong and injury of a substantial nature are apparent on the face of the record, that the power of the Court is invoked, whether objection was made in the Court below or not. In the case sub judice, to fully guide the courts the appendix contained the full, unabridged, unexpurgated testimony adduced at the trial.

2. That since the record reveals grave, palpable error due to mistake, passion or prejudice even the two court rule would enforce its exception to correct a substantial miscarriage of justice. Because, it was never contemplated by our law that a verdict of guilty which leaves reasonable doubt can stand. The constitutional bulwark of due process and the protecting precept of our jurisprudence, the presumption of innocence, make it imperative that where the evidence is equally indicative of innocence as of guilt, the defendant should be given the benefit of that doubt (R 19, 20).

3. In the brief to the Supreme Court of New Jersey, highest court of the State, seeking issuance of the petition for certification to the Appellate Division of the Superior Court of New Jersey, page 2, as an indicia of good faith, it was pointed out that the trial Court had issued a certificate of reasonable doubt of the legality of the conviction, admitting the defendant to bail.

It was also shown that all the judges of the Appellate Division participated in the argument before them on appeal with comments persuasively favorable to the accused, as follows:

JUDGE BIGELOW: (On argument that defendant passed the medical test): commented that defendant even picked the coins from the floor without his eyeglasses. (Regarding claim defendant drove on center line): that his recollection was that defendant drove on the two southbound lanes of the four lane highway. (Regarding defendant's inability to light his cigar): that he once rode with a friend, who passed a red light and he could not light his cigar, due to nervousness. (Regarding missing witness): that, if he were trying the case, he would ask the bartender if drinks were served full strength or diluted, but would not call the owners of the Norwood Inn to testify. (Regarding Sergeant Richards not testifying to defendant's condition): that when a police sergeant in court does not testify to defendant's condition, it indicates that he could not testify that defendant was unfit to drive.

JUDGE JAYNE: (Regarding quantum of proof to establish defendant's guilt): that prosecutor had no more than defendant's admission that he had two drinks. (Regarding drinks that do not affect mental operation or physical coordination): that uninfluencing drinking improves one's action. (Regarding trial judge's comments of missing witness): that the judge must be inexperienced. (Regarding defendant not showing his driver's license): that it might indicate a presence of mind showing fitness to drive, since he knew that he was twice before found guilty of drunken driving and wanted to conceal that fact from the officer.

JUDGE EASTWOOD: (Regarding trial judge's opinion on defendant's failure to bring owners of Norwood Inn to testify): read from opinion that though place was full why owners didn't somehow accommodate and serve the defendant and his company.

V.

Supporting Brief.

The highest State court has decided a substantial federal question, in a way not in accord with the United States Constitution and with applicable decisions of this Honorable Court; and, has so far departed from the accepted and usual course of judicial proceedings, on the requirement that defendant produce witnesses to sustain or present convincingly a premise or status of innocence, rather than oblige the State to establish guilt beyond a reasonable doubt, by the greater weight of the evidence on the assumed burden of proof, else serious violence is done to our constitutional rights of due process, guaranteed by the 14th Amendment to the United States Constitution. This is also the law in the State of New Jersey, and the overwhelming weight of authority throughout the Nation. Even if it were not so, State procedural rules must be reasonable and must not conflict with constitutional rights; and if they prevent or deny due process or a fair trial, the power of the Supreme Court of the United States to review, is set in motion. *Hammond Packing Co.* v. *Ark.*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530; *Harvey* v. *Elliot*, 17 S. Ct. 841, 167 U. S. 409, 42 L. Ed. 215; *Brown* v. *New Jersey*, 175 U. S. 175; *Kentucky* v. *Powers*, 201 U. S. 1.

A federal right has been ignored and denied without evidence to support it, *Fiske* v. *Kansas*, 274 U. S. 380, 385-6; no State can deny a person, fundamental rights in violation of the 14th Amendment to the United States Constitution, which imposes limitations upon the States in that regard, *Norwood* v. *Baker*, 172 U. S. 269.

Where findings of facts, such as the opinion of the intermediate appellate court, Appellate Division of the Superior

Court of New Jersey, are interwoven inextricably and involve the federal questions presented, the Supreme Court of the United States has the power and will grant the writ of certiorari, *Davis* v. *Wechsler, supra,* p. 8.

The declination of the Supreme Court of New Jersey, highest State court, to grant its petition for certification to review the intermediate appellate court below, in which a decision can be had, on June 8, 1953, makes the judgment of the lower court its own. The refusal to pass upon a federal question, raised before it, is just as reviewable as an express decision on the point. *Minneapolis, etc.* v. *Rock,* 279 U. S. 410; *Virginian R. Co.* v. *Mullins,* 271 U. S. 226; *Woods* v. *Nierstheimer,* 328 U. S. 211; *Tucker* v. *Texas,* 326 U. S. 517; especially where denial to review amounts to affirmance, *Tumey* v. *Ohio,* 273 U. S. 510, 515.

The petition seeks to correct a judgment that denied fundamental rights and does not seek to have this Honorable Court correct an opinion or to give an advisory opinion, *Herb* v. *Pitcairn,* 324 U. S. 117, 125-6; *Wood* v. *Chesborough,* 228 U. S. 672, 676-80; *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773.

The record, as a whole, shows expressly and by clear intendment that the federal questions were adequately presented. *N. Y. ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67; *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648. This petition presents an obvious and exceptional showing of error resulting in a gross miscarriage of justice negativing our Constitutional rights. We cannot permit erosion of high legal principles, protected by the law of the land, to catapult us back to trial by fiat or personal choice, the iron hand of despotism!

Respectfully submitted,

FRANK B. BOZZA,
Counsel for Petitioner.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND SUPERIOR COURT, APPELLATE DIVISION, OF THE STATE OF NEW JERSEY.

BRIEF FOR THE STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

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WILLIAM BRUNE,

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vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

Reference to official report of opinion delivered in the court below.

The Supreme Court of New Jersey, the court immediately below, denied certification to the intermediate appellate court, the Appellate Division of the Superior Court of New Jersey, the said denial of certification by the Supreme Court of New Jersey being officially reported in *12 N. J. 445* (Advanced New Jersey Reports under date of July 6, 1953, 97 A. (2) 201 *sub nomine State of New Jersey* v. *William Brune*).

The opinion of the Appellate Division of the Superior Court of New Jersey has not been officially reported, but

a copy of same is to be found on pages 1a-6a of printed record submitted by petitioner to the Supreme Court of New Jersey as a Supplemental Appendix to his petition to that court for certification.

II.

Counterstatement concerning jurisdiction.

Counsel for petitioner bases his contention that this Court has jurisdiction to review the judgment of the Supreme Court of New Jersey which denied certification to the Superior Court of New Jersey upon certain decisions (*McArthur* v. *U. S.*, 315 U. S. 787, 62 S. Ct. 915, 86 L. Ed. 1192 and *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194) and upon Section 1257 of the Judicial Code, Title 28 U. S. C. A. (Act of Feb. 13, 1925, Ch. 229, 43 Statutes 936, effective May 13th, 1925), Section 237 (b), as amended, reading:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree by the highest court of a State in which decision could be had . . . where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution . . ."

We respectfully submit that the denial of certification by the Supreme Court of New Jersey to the Appellate Division of the Superior Court of New Jersey, involving the questions presented in the petition in this case, is in conformity with the provisions of the United States Con-

stitution respecting due process of law as guaranteed therein,[1] and in conformity with the provisions of the Constitution of the State of New Jersey[2], and that neither the said Appellate Division of the Superior Court of New Jersey nor the Supreme Court of New Jersey in denying certification to the Appellate Division of the Superior Court decided any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decisions of the New Jersey courts.

III.

Counterstatement of the Case.

The petitioner, William Brune, on May 19th, 1952, was tried and convicted in the Municipal Court of the Borough of Verona, in the County of Essex, New Jersey, upon a complaint charging that on April 12th, 1952, in said Borough, petitioner unlawfully operated an automobile while

---

[1] Constitution of the United States, Amendment XIV, Sec. 1.

[2] The Constitution of New Jersey, 1947, Art. I, Sec. 1, provides:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Art. I, Sec. 10 of the New Jersey Constitution provides:

> "In all criminal prosecutions the accused shall have the right of a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

under the influence of intoxicating liquor in violation of N. J. S. A. 39:4-50.[3]

On appeal to the Essex County Court, on September 22nd, 1952, petitioner was tried and convicted upon a trial *de novo* before the county judge without a jury.[4]

Petitioner then appealed from the judgment of the County Court to the Appellate Division of the Superior Court, and after oral argument held March 9th, 1953, said Court, in an opinion filed March 18th, 1953 but not officially reported, affirmed the judgment of the Essex County Court.[5]

Petitioner thereafter filed a petition in the Supreme Court of New Jersey for certification to the Appellate Division wherein he contended that his conviction in the County Court was against the weight of the evidence, and

---

[3] N. J. S. A. 39:4-50 provides:

> "A person who operates a motor vehicle while under the influence of intoxicating liquor . . . shall be subject, for a first offense, to a fine of not less than two hundred nor more than five hundred dollars, or imprisonment for a term of not less than thirty days nor more than three months, or both, in the discretion of the magistrate, and shall forthwith forfeit his right to operate a motor vehicle over the highways of this state for a period of two years from the date of his conviction. For a subsequent violation, he shall be imprisoned for a term of three months and shall forfeit his right to thereafter operate a motor vehicle over the highways of this state . . ."

[4] Under *Rule 2:11(a)* of the New Jersey Criminal Practice and Procedure:

> "Appeals from the judgments of conviction in the inferior courts of limited criminal jurisdiction shall be taken to the County Court of the county in which such inferior court is located."

And under *Rule 2:11(h)*:

> "The appeal shall operate as an application for a trial *de novo* without a jury in the court to which the appeal is taken . . ."

[5] *Rule 4:2-1* of the Appellate Division provides:

> "Appeals in all causes may be taken to this court from final judgments:
>
> "b) In causes determined by the County Courts . . . ."

that the Appellate Division should have reversed the judgment, urging that the County Court "predicated its judgment of guilt, mistakenly and glaringly," and that its judgment was founded upon (a) "testimony or absence of testimony, almost entirely unrelated to the issue of sobriety;" (b) "testimony of the arresting officer, which in fact, knowledge and experience does not support the officer's conclusion of defendant's fitness to drive;" and (c) "the testimony and report of the examining doctor which negative the doctor's conclusion of defendant's unfitness to drive, since his tests show that defendant had ample orientation and coordination establishing his fitness to drive."

The Supreme Court of New Jersey denied certification on June 8th, 1953.

Petitioner now petitions this Honorable Court for a writ of certiorari to review the determination of the Superior Court and denial by the Supreme Court of New Jersey of certification to the intermediate appellate court.

IV.

Statement of the facts.

In the following statement of facts, the petitioner, William Brune, is referred to as the defendant.

On Saturday night, April 12, 1952, at about 11:45 P. M., police officer Charles E. Coad, while patrolling in a police car on Pompton Avenue, Verona, was attracted to defendant's car by the honking of horns of cars behind defendant's car. The officer got out of his car and he observed defendant's car about 200 feet away "parked directly on the double white line of the Turnpike . . . in the center of the

street," and a number of cars behind honking their horns (R. 4a). Defendant's car "started suddenly forward in a jack-rabbit or jerky motion," and it weaved from side to side in the two southbound lanes (R. 4a). The car passed the officer, and it again stopped in the center of the street, blocking the traffic behind it. The officer approached the car, he blew his whistle and flashed his light, but Brune kept on going. The officer pursued the car a short distance and forced it to the curb; he walked to the driver's side; and when the door opened Brune "appeared to fall out of the seat" and he caught himself before he fell (R. 5a-6a). As defendant stood alongside his car, with the officer close by, he "was weaving, or he was unsteady on his feet. He was very confused, and he just did not seem to know what was going on at the minute" (R. 6a). The officer testified that defendant "had a strong . . . to me it was a strong alcoholic breath," and when asked for his driver's license, he was "very unsteady," and he "couldn't find his license" (R. 6a). The officer led him to the police car and drove him to police headquarters, as well as three other passengers in defendant's car, a Mr. Nunzio Nappe and two "girl friends." On the trip to headquarters, Nappe gave defendant a cigar and tried to light it for him, but the cigar "just fell out of his mouth" (R. 6a-7a). Defendant admitted to the officer that "he had been drinking" (R. 7a), and he was confused as to where he was at the time. It was the officer's testimony that from his observation of defendant, he was "under the influence of intoxicating liquor" and "unfit to operate a motor vehicle" (R. 9a).

At police headquarters defendant was examined by Doctor John W. Borino who applied various tests of sobriety. It was the doctor's conclusion that (R. 19a):

> ". . . on the basis of the fact that he admitted having had several drinks, and on the basis of the

fact that he showed some alcoholic breath, and on the basis of the fact that he was incoherent, on the basis of the fact that he swayed some, and on the basis of the fact that he was confused, I made the diagnosis the man was unfit to drive; that he was under the influence of an alcoholic beverage."

Defendant, in his own behalf, testified that he had two drinks of Scotch whiskey at about 10:00 P. M. (R. 32a).

He admitted, also, that he had previously been convicted of the same kind of offense on two previous occasions (R. 37a).

Defendant's passenger, Nunzio Nappe, testified in defendant's behalf that defendant was not under the influence of liquor.

Defendant failed to produce any of the two "girl friends" who were his passengers, nor any of the persons in the barroom where he had had the drinks of whiskey.

V.

Summary of the Argument.

We respectfully submit there was no violation of due process:

FIRST: In connection with the trial *de novo* in the County Court.

a. The trial judge decided the factual issue upon the basis of the evidence presented, the credibility of the witnesses, and the weight to be given their testimony.

SECOND: In connection with the judgment of the Appellate Division of the Superior Court in affirming the judgment of the County Court.

a. In reviewing the facts of the case, there was no justification for exercising its power, permissive under New Jersey law, to make new or amend the findings of fact of the County Court.

THIRD: In connection with the denial of certification by the Supreme Court of New Jersey to the Appellate Division.

a. There was no legal justification for the granting of certification to the Appellate Division by the Supreme Court of New Jersey.

VI.

Argument.

POINT ONE.

The trial judge in the County Court, sitting without a jury, properly determined the factual issue of whether defendant operated the car while under the influence of intoxicating liquor.

There was ample credible evidence to justify the trial judge's conclusion that defendant committed the violation.

There was the evidence of the arresting officer who testified to defendant's intoxicated condition and operation of the car at the time of the arrest.

And there was the evidence of the examining physician who testified that at the time of the examination, shortly after the arrest, the defendant "was under the influence of an alcoholic beverage" and that he "was unfit to drive."

In his own behalf, although he denied intoxication, defendant admitted having had two drinks of whiskey less

than two hours before the arrest, in which he was corroborated by witness Nappe.

And there was the evidence of defendant's two prior convictions for a similar violation.

Thus, there was presented to the trial judge the factual issue of whether defendant committed the violation; and the judge, sitting without a jury as the trier of the facts, and exercising his function of resolving the questions of the credibility of the witnesses and the weight to be given their evidence, properly resolved those questions in favor of the witnesses for the State.

The gist of defendant's argument in his brief seems to be that, the Court should not have believed the State's witnesses; that he indulged in "harmful, wide speculation" in disbelieving defendant's story respecting his inability to procure a table at the barroom where he admittedly had his drinks of whiskey because of the crowded condition of the bar, and respecting defendant's failure to produce corroborative witnesses; and that by reason thereof, the defendant was denied his constitutional right to due process of law.

With this we cannot agree.

It is the established law of New Jersey that a proceeding under the statute is a summary proceeding on a penal statute without a jury, and quasi-criminal in nature (*State* v. *Rowe,* 116 N. J. L. 48; *State* v. *Rosenblum,* 100 N. J. L. 240; *Latimer* v. *Wilson,* 103 N. J. L. 153); and in such proceeding, the judge is the trier of both the law and the facts.

We respectfully submit that in the instant case the trial judge had the advantage of observing the witnesses, their demeanor and conduct, and to best judge of the credibility of the witnesses and the weight to be given their evidence.

The defendant was given a fair trial in every respect; his substantial and constitutional rights were fully

respected and safeguarded; and it cannot be said that he was deprived of due process of law.

Neither does he show in what manner his rights were denied him other than to claim that the trial judge erred in arriving at his conclusion that defendant had committed the violation charged.

POINT TWO.

There was no denial of due process by the Appellate Division of the Superior Court of New Jersey in affirming the judgment of conviction of the County Court.

The gist of petitioner's argument in his brief seems to be that the Appellate Division of the Superior Court should have amended and changed the factual findings of the County Court, and by failing to do so, and by affirming the judgment of the County Court, the petitioner was denied due process.

With this we cannot agree.

Under New Jersey practice, on an appeal from the County Court to the Appellate Division, the appellate court may make new or amended findings of fact.[6]

In the instant case, the Appellate Division made a full and fair review of the facts adduced by the evidence, and it made the following pertinent statement in its opinion (pp. 2a-3a of Supplemental Appendix to Petition for Certification in the Supreme Court of New Jersey):

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[6] New Jersey Supreme Court *Rule 1:2-20* and Appellate Division *Rule 4:2-6* provide:

> "On a review of any cause involving issues of fact not determined by the verdict of a jury, new or amended findings of fact may be made, but due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . ."

"The judgment of the County Court nullifies the judgment of the municipal court when there is a trial *de novo* on appeal in the County Court and the defendant is entitled to a review of the County Court judgment only. *State* v. *Hunter,* 12 N. J. Super. 128, 131 (App. Div., 1951). The burden of establishing defendant's guilt beyond a reasonable doubt is upon the State. *State* v. *Glynn,* 20 N. J. Super. 20, 27 (App. Div., 1952). Under the authority of *R. 1:2-20 (a)* and *4:2-6,* we may, on appeal, review the facts and make new or amended findings of fact where, in the interests of justice, we are persuaded such action should be taken. *DeMoors* v. *Atlantic Casualty Insurance Company,* 1 N. J. Super. 1 (App. Div., 1948); *Series Publishers, Inc.* v. *Greene,* 9 N. J. Super. 166, 171 (App. Div., 1950); *Goldman* v. *Shapiro,* 16 N. J. Super. 324, 326 (App. Div., 1951). This power vested in the Appellate Court is permissive and litigant may not as a matter or right require this court to exercise it. *Folsom* v. *Magna Manufacturing Co.,* 14 N. J. Super. 363 (App. Div., 1951). While a finding of fact by the trial judge, when reviewed pursuant to the aforementioned rule, has not as great force as a jury's verdict, due regard must be given to his opportunity to judge of the credibility of the witnesses. *Capone* v. *Norton,* 11 N. J. Super. 189 (App. Div., 1951); *In re Perrone,* 5 N. J. 514 (1950). This court's power to make new or amended findings of fact should be exercised sparingly. *Vandenberg* v. *John DeKuyper & Son,* 5 N. J. Super. 440 (App. Div., 1949). Where the issue is entirely factual and the County Court, on sufficient evidence, determines the guilt of the defendant, there is no justification for disturbing its findings. *State* v. *Nolan,* 1 N. J. Super. 280 (App. Div., 1949); *State* v. *Glynn, supra.*"

After commenting upon the facts of the case, the Appellate Division came to the following conclusion (p. 6a of

Supplemental Appendix to Petition for Certification in the Supreme Court of New Jersey):

> "We have recited sufficient facts, as gleaned from the testimony, to demonstrate that there was sharp conflict therein. The defendant's contentions are grounded principally upon the alleged weaknesses and inconsistencies of the State's witnesses, Dr. Borino and Officer Coad. At best, the contentions go to the credibility of the witnesses and the weight of their evidence. Such questions are for the determination of the trial judge, who is in the better position to resolve them.
>
> "Two tribunals have on sufficient evidence determined the guilt of the defendant and we perceive no justification for disturbing the findings of the County Court. *State* v. *Nolan, supra.*"

We respectfully submit that there was no justification for the Appellate Division, after reviewing the facts of the case and allowing for the opportunity of the trial judge to judge of the credibility of the witnesses, as provided for under the above-quoted Rules to make any new or amended findings of fact, and it cannot be said that the refusal or failure on the part of the Appellate Division to exercise its permissive right constituted a denial of due process.

POINT THREE.

There was no denial of due process by the Supreme Court of New Jersey in denying certification to the Appellate Division.

The court of last resort in the State of New Jersey is the Supreme Court, which denied certification to the Appellate Division (*State* v. *Brune,* 12 N. J. 443; 97 A. 2d 201.)

New Jersey Supreme Court Rule 1:5-1, governing certification to the Appellate Division, provides:

> "Certification to the Appellate Division is not a matter of right, but of sound judicial discretion, and will be allowed on final judgments only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where the Appellate Division has decided a question of substance not theretofore determined by a court of last resort of this State, or has decided it in a way probably not in accord with applicable decisions of such court.
>
> "(b) Where the decision under review is in conflict with any other decision of the Appellate Division.
>
> "(c) Where the judges of the Appellate Division concur in result, but are unable to agree upon a common ground of decision.
>
> "(d) Where the Appellate Division has decided an important question of law which has not been, but should be settled by this court; or has so far departed from the accepted or usual course of judicial proceedings, or so far sanctioned such a departure by a lower tribunal as to call for an exercise of this court's discretion.
>
> "(e) Where the Appellate Division has decided a question of substance relating to the construction or application of a statute of this State, which has not been, but should be settled by this court."

From a reading of defendant's brief, it seems that his claim of denial of due process is based upon two questions arising at his trial in the County Court; namely, the trial judge's comment on defendant's failure to produce a wit-

ness (the owner or manager of the Norwood Inn where defendant said he had the two drinks of whiskey and with whom he spoke concerning the purchase of a car), and the testimony of the examining physician who testified that, while defendant performed some of the tests in a fairly satisfactory manner, and his appearance and demeanor were not otherwise improper, he based his conclusion of intoxication and unfitness to drive upon other factors such as defendant's admission of drinking, alcoholic breath, incoherence of speech, swaying, and confusion.

a.

As to the Court's Comment.

This was the trial judge's comment at the conclusion of the trial which petitioner complains of (R. 67a):

> "Then, the defendant comes here and says that he was going to buy a car from someone who apparently had something to do with the Norwood Inn. Where is the person from the Norwood Inn? If he were buying a car or going to buy a car or discussing the buying of a car from someone who had something to do with the Norwood Inn, it seems very improbable to me that even though they might have been crowded that night he could not get a table. Why wouldn't that person have been inclined to do a small favor for the defendant to get him to buy the automobile and as a result of that get a table for him?
>
> "The story that the defendant tells in my mind is very, very improbable. He does not deny, of course, that he had a few drinks. He does deny that he was unfit. His recollection in some regards differs materially from that of the police officers and the doctor. Nothing has been shown to discredit, in my opinion, any of the testimony of the police officers. There is nothing to show that they are here telling untruths.

"Under all the circumstances, I find the defendant guilty as charged."

From a reading of the above, it cannot be said, as petitioner claims, that the Court predicated its conclusion of guilt upon defendant's failure to produce as a witness the man in the Norwood Inn whom he went to see relative to the purchase of a car.

Defendant testified that he and his friends stopped in the Norwood Inn; that he spoke to the owner or manager of the place; that the place was so crowded that he was unable to get a table; and that after having two drinks of whiskey the party left.

In making the statement it did, the Court merely intimated that defendant's story about the happenings in the Norwood Inn were questionable; and there is nothing in the Court's comment to show that the Court drew an inference of guilt from the mere fact that the man in the Norwood Inn was not produced as a witness. On the contrary, the Court pointed out that there was nothing shown to discredit the State's witnesses, and that "Under all the circumstances" of the case the defendant was proven guilty as charged.

b.

As to the Examining Physician's Testimony.

The examining physician testified for the State to portions of the tests as either fair or good; that defendant was polite; not boastful or loud in his conversation; that his clothing was not disarranged. And he concluded that defendant was "under the influence of an alcoholic beverage" and "unfit to drive" based upon other factors such as admission of drinking liquor, presence of an alcoholic breath, incoherent speech, his swaying, and confusion.

The physician was subjected to rigid cross-examination on any alleged inconsistencies in his testimony, but his conclusion as to intoxication and unfitness to drive remained unshaken, and that evidence was accepted by the Court.

Under all these circumstances, we fail to perceive how the petitioner was in any way deprived of his substantial rights to due process.

We have examined all of the cases cited by petitioner in his brief, and we submit they have no direct application to the questions here raised.

Petitioner was accorded a fair and impartial trial and all of his rights were fully safeguarded in every tribunal in which his case was considered.

We, therefore, respectfully submit that there is no substance in petitioner's complaint that he was denied due process of law on any of the grounds submitted.

VII.

Conclusion.

For the reasons herein set forth, we respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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